LAU CHEE CHING

v.

NIAH NATIVE LOGGING SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: Q-02-465-97]
10 JUNE 2002

CIVIL PROCEDURE: *Pleadings - Striking out defence - Failure of judge to interpret words in deed of settlement - Whether amounted to misdirection - Whether proper case for statement of defence to be struck out*

The appellant was alleged to have failed to account some money into the respondent's company account. Subsequently, both parties executed a deed of settlement in which the appellant agreed to pay the respondent by instalments. Following the appellant's default on the payment of instalments, the respondent filed this present action. In the court below, the respondent obtained an order for striking out of the statement of defence. The appellant appealed.

Held:
Per Mohd Saari Yusoff JCA

[1] The words "any of the instalments" as stated in cl. 4(a) of the deed seemed to suggest that the plaintiff was entitled to enforce the deed and to insist on full payment less the amount paid, in the event that the defendant defaulted payment of any of the instalments. (p 542 c)

[2] The learned judge erred when she had failed to address her mind to the words "any of the instalments" in cl. 4(a) of the deed, which amounted to misdirection. Furthermore, by virtue of *Low Yat v. GC Grace*, this was not a proper case for the statement of defence to be struck out. (pp 542 h & 543 a)

[Appeal allowed; case remitted back to court below to be tried.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu didakwa telah gagal untuk memasukkan sejumlah wang ke dalam akaun syarikat responden. Kemudiannya, kedua-dua pihak telah melaksanakan suatu suratikatan penyelesaian di mana perayu bersetuju untuk membayar kepada responden secara ansuran. Berikutan dengan kegagalan perayu untuk membuat bayaran ansuran tersebut, responden telah memfailkan tindakan ini. Responden telah mendapat perintah untuk membatalkan penyata pembelaan. Perayu kini merayu.

Diputuskan:
Oleh Mohd Saari Yusoff HMR

[1] Perkataan "mana-mana ansuran" seperti yang dinyatakan di dalam kl. 4(a) suratikatan tersebut nampaknya mencadangkan bahawa plaintif adalah berhak untuk melaksanakan suratikatan tersebut dan menuntut bayaran penuh ditolak amaun yang telah dibayar, sekiranya defendan mungkir di dalam mana-mana pembayaran ansuran.

[2] Hakim yang bijaksana telah khilaf apabila gagal untuk mengarahkan fikirannya kepada perkataan "mana-mana ansuran" di dalam kl. 4(a) suratikatan tersebut, yang membawa kepada silap arahan. Seterusnya, selaras dengan kes *Low Yat v. GC Grace*, ini bukanlah satu kes yang sesuai untuk membatalkan penyata pembelaan.

[Rayuan dibenarkan; kes dihantar semula ke mahkamah di bawah untuk dibicarakan.]

Case(s) referred to:
Low Yat v. GC Grace [1947] 13 MLJ 115 ***(refd)***
Ooi Kiah Inn Charles v. Kukuh Maju Industries Sdn Bhd [1993] 3 CLJ 199 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24, 25
Rules of the High Court 1980, O. 18 r. 19

Other source(s) referred to:
Pollock & Muller, *Indian Contract and Specific Relief Acts*, 10th edn, p 289

For the appellant - Wong Chong Wah (Dennis YM Lau & Elaine Yap); M/s Jamal & Lau
For the respondent - Chong Siew Chiang (Lawrence YS Lai); M/s Awang, Lai, Sandhu & Co

[Appeal from High Court, Miri; Suit No: MR27 1990]

Reported by Raja Vishnu Sivarajah

a

JUDGMENT

Mohd Saari Yusoff JCA:

In the court below, the respondent (hereinafter referred to as "the plaintiff") applied and obtained order under O. 18 r. 19 RHC 1980 for striking out statement of defence. The present appeal is by the appellant (hereinafter referred to as "the defendant") against the said order.

b

The salient facts as disclosed in the affidavits are as follows:

Between 1 March 1979 and 27 April 1989, the plaintiff employed the defendant as a company secretary. During his tenure of office, it was alleged that the defendant had failed to account RM2,585,828.01 which formed the subject matter of dispute in the present action. The upshot of the said allegation was that the plaintiff lodged a police report and also instituted two civil suits against the defendant.

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Later on 10 November 1989, both parties executed a deed of settlement (exh. W1) (hereinafter referred to as '"the deed"). Under the deed, the defendant agreed to pay the plaintiff RM1.2 millions by instalments on dates as stipulated in the deed. In consideration, the plaintiff agreed to withdraw the police report and two civil suits namely MR 48/89 and MR 49/89.

e

Pursuant to the terms of the deed, the plaintiff withdrew the police report and the two civil suits. In the case of the defendant, after paying a total sum of RM460,000, the defendant stopped payment of instalments, hence the plaintiff filed the present action.

f

Under the deed, the parties agreed as follows:

1. LCC shall pay to the Company the sum of Malaysian Ringgit One Million And Two Hundred Thousand (M$1,200,000.00) only as follows:

g

(a) The sum of Malaysian Ringgit Two Hundred Thousand (M$200,000) only on or before 30 November 1989;

(b) The balance sum of Malaysian Ringgit One Million (M$1,000,000) only shall be paid by LCC in five (5) equal monthly instalments of Malaysian Ringgit Two Hundred Thousand (M$200,000) only each and in this respect, LCC shall deposit five (5) postdated cheques (as particularised below) with Messrs. C.C. Lau & Co. advocates as stakeholders:

h

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Date	Amount
30 December 1989	M$ 200,000
30 January 1990	M$ 200,000
28 February 1990	M$ 200,000
30 March 1990	M$ 200,000
30 April 1990	M$ 200,000
	M$1,000,000

2. (not applicable)

3. In consideration of the payment of M$1,200,000 under cl. 1 above, the company agree to do the following:

   (a) to withdraw the said police report upon receipt of the sum of M$200,000 under cl. 1(a) above;

   (b) to discontinue the said suits No. MR. 48/89 and MR. 49/89 against LCC upon receipt of the balance of M$1,000,000 under cl. 1(b) above;

   (c) to release LCC from all obligations, liabilities and debts in respect of the operation of the company at all times.

4. It is mutually agreed by the parties as follows:

   (a) that in the event of default of payment of any of the instalments or if any of the cheques particularised in cl. 1 above were dishonoured upon presentation for payment, then the company shall be entitled to sue LCC for the full sum of M$2,585,828.01 after deducting whatever money paid by LCC to the company under cl. 1 above.

   (b) that upon full payment of M$1,200,000 under cl. 1 above, neither party shall have any claim whatsoever against the other party in respect of the operation of the company at all times.

In his pleading, it was averred by the defendant that the deed was illegal, void and unenforceable as being contrary to s. 24 and/or 25 of Contracts Act 1950. Reference was made to the case of *Ooi Kiah Inn Charles v. Kukuh Maju Industries Sdn Bhd* [1993] 3 CLJ 199. In that case, Peh Swee Chin SCJ (as he then was) at p. 203 observed:

> Such contracts to stifle prosecution are unlawful because their consideration or object is against public policy and they are caught by the second limb of s. 24(e) of the Act.

En. Chong, learned counsel for the plaintiff, submitted that cl. 3(a) which was on withdrawal of the police report was independent of the rest of the deed. He contended that cl. 3(a) is severable.

Having regard to the words "any of the instalments" as stated in cl. 4(a) of the deed, it seems to suggest that the plaintiff is entitled to enforce the deed and to insist on full payment of RM2,585,828.01 less the amount paid, in the event that the defendant defaulted payment of any of the instalment. In construing the words "any of the instalments" in cl. 4(a), it appears that cl. 4(a) also applies to cl. 3(a) which is the illegal part of the deed. On the question of whether cl. 3(a) is severable, it would depend on the facts and circumstances of each case. In this regard, it is pertinent to refer to Pollock & Muller on *Indian Contract and Specific Relief Acts* (10th edn) at p. 289 (bottom) which states:

> A promise made for an unlawful consideration cannot be enforced, and there is not any promise for a lawful consideration if there is anything illegal in a consideration which must be taken as a whole. On the other hand, it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The test is whether a distinct consideration which is wholly lawful can be found for the promise called in question. "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void;"

In *Low Yat v. G.C. Grace* [1947] 13 MLJ 115, the plaintiff filed a suit against the defendant claiming damages for assault and wrongful imprisonment. The defendant applied for the complaint to be struck out on the ground that it disclosed no reasonable cause of action. In that case, Willan CJ (as he then was) at p. 119 said:

> I cannot say that this is a plain and obvious case in which I should act under 1932 Rule 1 sub-rule 33. In my view there is an issue which should be tried, and it can only be tried by the action pursuing its normal course and being heard in Court.

Turning to the judgment of the learned JC, with greatest respect, we find that her judgment is flawed as she had failed to address her mind on the words "any of the instalments" in cl. 4(a) of the deed, which amounted to a misdirection.

Applying the principle enunciated in *Low Yat*'s case *(supra)* to the facts, we are of the view that this is not a proper case for the statement of defence to be struck out. Accordingly, we allow the appeal and remit the case back to the court below for the case to be tried. The plaintiff to pay cost here and below and we further order for the deposit to be refunded.

Both my learned brothers Mokhtar bin Haji Sidin and Alauddin bin Dato' Mohd. Sheriff have read this judgment in draft and have expressed their agreement.